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OCT 9 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 62

JACK R. GOLDBERG,
Commissioner of Social Services of the City of New York,

Appellant,

—against—

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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(1)

The briefs submitted by appellees and the *amicus curiae,* National Institute for Education in Law and Poverty, while bristling with case citations, ultimately rest on nothing more than their claims that general guidelines to due process developed under other factual patterns should be applied here. Appellant must face the same problem. There are no cases decided by this Court which require that the constitutional standards of due process of law appropriate to criminal trials, civil suits at common law, or in equity or under statutory right, or in a variety of administrative proceedings conducted by regulatory agencies should necessarily be applied to determine the question of whether or not someone's welfare payments should be terminated. Appellees,

however, faced with this problem attempt to weight their argument by a subjective depiction of the relationship between the welfare client and the caseworker.

The client is conceived by appellees as the honest but ineffectual, inarticulate victim (Br. 34). The caseworker is characterized as suspicious (Br. 31), hostile (Br. 33), untrained (Br. 34), punitive, moralistic (Br. 36), domineering (Br. 36), politically motivated (Br. 37), unreliable and capricious (Br. 41), whose decisions rest on whim or surmise (Br. 42). Investigation might well establish, contrary to appellees' charges, that generally caseworkers are well trained, dedicated, conscientious and sympathetic to the needs of their clients. Even so, some mistakes will occur and the client under the regulations and procedures challenged here is given the means to prevent actions adverse to his interest. There can be no doubt moreover that, while the great majority of welfare beneficiaries are tragic victims of age, poor health, unemployment, broken marriages, racial discrimination and other social ills, fraud and misrepresentation are not unknown or uncommon among the millions who claim welfare benefits. In short, it is incorrect to assume that the welfare system is exposed solely to the just demands of the virtuous poor and customarily responds with callous indifference.

Under these circumstances a balancing of interests is warranted. If the welfare system suffers from extensive overpayments to persons who are ineligible, the general public is damaged; there will be a loss of confidence in the system; and, in response to taxpayers demands, legislators may well cut back further on allocations for welfare which are presently at a minimal standard. On the other hand, appellant does not deny that individual hardship can result from an arbitrary, uninformed termination of benefits.

In response to these needs, procedures designed to protect the state against fraud and waste and at the same time protect individual welfare recipients against arbitrary termination of their benefits were instituted in New York State and New York City. As applied in the City these procedures did not include a trial type hearing with witnesses and cross-examination. Appellees claim and the court below agreed that this omission was constitutionally fatal. Yet the procedures in question were not designed to stop the flow of information between the Department of Social Services and its clients. It was an underlying premise throughout the implementation of these new procedures that communication was essential but confrontation, as in a trial, was not.

Under New York City's Procedure No. 68-18 (Exhibit following p. 148a), which was issued to implement 18 N.Y.C.R.R., Section 351.26 (b), the caseworker must discuss with the client the reasons for a proposed suspension or discontinuance of assistance. After discussing the matter with the client, if the caseworker concludes the client is no longer eligible for assistance, he forwards the case record to a unit supervisor for review. Only if the unit supervisor agrees with the caseworker's recommendation will the seven day notice of intent to suspend, or discontinue assistance be sent to the client. Thus the client is informed prior to the receipt of the formal notice that his eligibility is in doubt and has an opportunity in a conference with his caseworker to show that he remains eligible if that is the case.

After receipt of the written notice, which again states the reasons for the proposed termination, the client may request a review and, with the aid of counsel, if desired, he may submit any written data in support of his claim of continued eligibility. The case record and any material submitted by the client is then examined by a review officer. Assistance continues throughout this process until the re-

view officer makes his determination. Thus there are three separate examinations of the question of eligibility before any action adverse to the client is taken. The caseworker discusses the problem with the client; the unit supervisor reviews the record and the caseworker's recommendation; and finally the review officer makes a third examination of the matter including consideration of anything submitted by the client or his counsel. Finally, if the review officer determines the client is not eligible, the client is notified and advised of the reasons for his termination, and in the same notice he is told (Form M-3h to Procedure No. 68-18 following p. 148a):

> "If you are dissatisfied with this decision you may request a Fair Hearing, in writing or orally, by communicating with the State Department of Social Services, 270 Broadway, New York, N. Y. 10007, Telephone Number 488-6550."

The validity of the Fair Hearings is not in question. If the client is restored to the welfare rolls after a Fair Hearing, any benefits wrongfully withheld are paid up retroactively to the date of termination (322a-323a). In New York the matter need not stop at the Fair Hearing stage. If the client is unsuccessful, the decision of the hearing officer may be reviewed in New York State Supreme Court under Article 78 of the New York Civil Practice Law and Rules.

The focus of this case then is narrow. Benefits may be terminated under Section 351.26 (b) after the review officer's decision. Statistically it is predictable that there will be some percentage of cases that a review officer will terminate only to have his decision reversed after a Fair Hearing. In the brief experience under New York City's procedure the number of reversals of termination decisions

had dropped to three per month or less (358a-363a). A system that works this well, where the client is protected by the safeguards outlined above, should not be deemed constitutionally defective on its face.

(2)

The court below responded more strongly than is required constitutionally in striking down Section 351.26 (b). In all likelihood this result was influenced by appellees stress on the difficulties experienced by some of them resulting from erroneous termination of benefits before any prior review procedure was instituted. In *Kelly* v. *Wyman,* the complaint was filed on January 29, 1968. In *Shaefe* v. *Wyman,* the complaint was filed on February 29, 1968. In *Negron* v. *Wyman,* the plaintiff intervenors filed their notice of motion to intervene on June 17, 1968. All of these cases are consolidated on this appeal but only the last case was brought after the regulations under attack become effective in New York City.

The new regulation, §351.26, was first promulgated by the New York Department of Social Services to become effective on March 1, 1968. This regulation was the predecessor of what is now §351.26(a). It could not be implemented in New York City on that date and negotiations followed between the City and the State concerning an amendment acceptable to the City. Subsequently on April 26, 1968 the State repealed §351.26 and issued a new regulation consisting of §351.26(a) and (b) (125a-130a). The City elected to proceed under §351.26(b) and submitted to the State a proposed procedure for implementation of the new regulation. After approval of the City's proposal (Procedure No. 68-18) the new regulation became effective in New York City on May 27, 1968 (145a-148a). Thus, whatever the experience of the plaintiffs may have been,

none of the original plaintiffs and only a few of the plaintiff-intervenors had any experience under the new procedures. Their respective claims are discussed in the affidavit of Merrill Charlton (322a-330a).

The new system proved to be effective. Erroneous decisions of caseworkers were corrected by the review officer. The number of reversals of termination decisions after Fair Hearings dropped dramatically (320a-321a, 358a-363a). Nevertheless, the District Court found §351.26(b) to be constitutionally inadequate. More safeguards can always be imposed but there should be a showing of substantial inherent risk to constitutionally protected rights before a new system that is working well is discarded. It may be innovative. It may not be traditional. Still it is not for those reasons defective. Section 351.26(b), as implemented in New York City by Procedure No. 68-18, shows a persistent concern for individual rights. The client is consulted. Any facts he has can be brought forth. Not less than three levels of authority review the case prior to termination. There are strong insulating safeguards in this procedure to protect the client against arbitrary and uninformed action. The basic requirements of due process under these circumstances are met. The decision below, therefore, was not required by relevant constitutional standards.

CONCLUSION

The decision below should be reversed. The injunction should be vacated. Appellant's motion for a summary judgment should be granted and the complaints should be dismissed.

October 9, 1969

Respectfully submitted,

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